IN THE

SUPREME COURT OF THE UNITED STATES

October Term

No. 82-6611

DALE ROBERT YATES, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 18th DAY OF May, 1983

Harold M. Coombs, Jr.
ATTORNEY FOR Respondent.

SWORN TO BEFORE ME THIS 18th DAY OF May, 1983

Karen G. Newton
Notary Public for South Carolina
My Commission Expires 9-17-86

QUESTIONS PRESENTED

I.

Did the trial court err in refusing to make Willie Wood's statement available to the Petitioner at trial when said statement was not favorable to the Petitioner, did not create a reasonable doubt as to the Petitioner's guilt, and did not deprive Petitioner of information of which he was not already aware?

II.

Did the trial court err in refusing to charge the State's request to charge number 3 when said proposed charge was not a correct statement of the applicable law since South Carolina adheres to the common law rule of murder and makes no distinction between murder and felony murder?

III.

Did the trial court err during the penalty phase of trial in refusing to charge Petitioner's request to charge number 2 when the substance of the request was actually given to the jury?

INDEX

TABLE OF AUTHORITIES

SOUTH CAROLINA STATUTES:

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21835, filed December 22, 1982, as reproduced in Petitioner's Appendix A at pages 1-10.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the trial court err in refusing to make Willie Wood's statement available to the Petitioner at trial when said statement was not favorable to the Petitioner, did not create a reasonable doubt as to the Petitioner's guilt, and did not deprive Petitioner of information of which he was not already aware?

ARGUMENT

I.

The trial court did not err in refusing to make Willie Wood's statement available to the Petitioner at trial.

Willie Wood made a statement to the Greenville County Sheriff's Office dated February 14, 1981. (Petitioner's Appendix E). At trial, the court obtained a copy of the statement and advised Petitioner's counsel that it would be given to him (counsel) "if you need it." (Petition p. 11). In State v. Yates, Opinion No. 21835, filed December 22, 1982, the South Carolina Supreme Court held:

> The statement contained the same basic facts as testified by Mr. Wood during the trial. The information within the statement is consistent with indictment and trial testimony. The Appellant was not deprived of information of which he was not already aware and which was actually available to him. (Petitioner's Appendix A-4).

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) creates no rights to discovery. Rather, Brady is concerned with whether or not requested evidence favorable to the accused -- but suppressed by the prosecution -- violates due process where the evidence is material to guilt or punishment. For constitutional error to exist, the requested, non-disclosed favorable evidence must create a reasonable doubt as to the defendant's guilt that did not otherwise exist within the context of the whole record. State v. Mixon, 275 S.C. 575, 274 S.E.2d 406 (1981), citing, United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392,

49 L.Ed.2d 342 (1976). Simply stated, the Brady test is whether the solicitor's failure to reveal requested, favorable information "deprived the defendant of a fair trial." United States v. Agurs, 427 U.S. at 108, cited in, State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981).

Appellant's reliance on James v. State, 143 Ga. App. 696, 240 S.E.2d 149 (1977) is misplaced since that decision is based upon statutory criminal discovery in the State of Georgia. Further, James has since been explained to preclude the necessity for remand, even under the Georgia statutory scheme of discovery, where the appellate court is able to determine that the evidence in question involves only inculpatory statements not impeaching in character. Odom v. State, 156 Ga. App. 119, 274 S.E.2d 117, 118-119 (1980).

In the present case there was no conceivable Brady violation or denial of the Petitioner's rights to due process.

QUESTION PRESENTED

II.

Did the trial court err in refusing to charge the State's request to charge number 3 when said proposed charge was not a correct statement of the applicable law since South Carolina adheres to the common law rule of murder and makes no distinction betwen murder and felony murder?

ARGUMENT

II.

The trial court did not err in refusing to charge the State's request to charge number 3.

In part, the requested charge states "if the common design was to commit a felony, he is liable [for a homicide committed by a co-defendant] although the homicide resulted collaterally therefrom." (Petition p. 15). Respondent respectfully submits that the finding by the South Carolina Supreme Court on this issue (Petition pp. 15-16) was entirely correct.

Even by Petitioner's own testimony, nothing in the record indicates that the Wood homicide resulted collaterally from the armed robbery. Rather, the record indicates only that the Petitioner's confederate, Davis, stabbed Mrs. Wood to death as he (Davis) attempted to leave the store pursuant to the execution of their (Petitioner's and Henry Davis') common design and purpose to commit an armed robbery. (Petitioner's Appendix A-1, A-2, A-4). The refusal of the State's proposed charge was clearly to the benefit of the Petitioner since the proposed charge would have elevated a hypothetical, arguably accidental killing into murder simply because it occurred in the commission of a felony. The correctness of the ruling by both the trial court and the South Carolina Supreme Court is apparent from the Petitioner's trial counsel's ground for wanting the charge included. "We'd love to have it in your charge

because we think it is absolute error. That would blow this case completely out the bottom. ..." (Tr. p. 1162, lines 18-20). The Petitioner should not now be heard to complain of the trial court's failure to commit a proposed error.

QUESTION PRESENTED

III.

Did the trial court err during the penalty phase of trial in refusing to charge Petitioner's request to charge number 2 when the substance of the request was actually given to the jury?

ARGUMENT

III.

The trial court did not err during the penalty phase of trial in refusing to charge Petitioner's request to charge number 2.

During the penalty phase of trial, the trial judge charged the jury inter alia that in addition to the statutory enumerated mitigating circumstances given to them in writing, they were to consider "any other mitigating circumstances which the Defendant has presented for your consideration." (Tr. p. 1361, lines 18-19; p. 1362, lines 14-18). The trial judge included in the written statutory mitigating circumstances pursuant to South Carolina Code Section 16-3-20(C)(b)(4) "the Defendant was an accomplice to the murder, committed by another person, and his participation was relatively minor." (Tr. p. 1362, lines 4-7). Prior to proceeding to the next statutory aggravating

circumstance the trial judge elaborated, "In other words, that embraces the theory that the Defendant did not, himself, personally strike the fatal blow." (Tr. p. 1362, lines 7-9).

While Appellant argues that it was error for the trial judge to fail to charge orally and in writing his request to charge number 2, an examination of the record and law completely refutes this contention. Defendant's request to charge number 2 reads "That Dale Robert Yates did not kill the victim, Helen Wood." (Tr. p. 1808).

While a jury must be told that they may consider any mitigating circumstances, "this does not require that they be given to the jury in writing as is required for the statutory mitigating circumstances." State v. Linder, 276 S.C. 304, 278 S.E.2d 335, 339 (1981), citing, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); South Carolina Code Section 16-3-20(C) (Cum. Supp. 1981). The trial testimony from both the State and the Appellant was that the Appellant did not personally strike the blow which killed Mrs. Wood. Where non-statutory evidence in mitigation is already before the jury, failure to give a specific oral instruction as to that evidence is not necessarily prejudicial and reversible error. State v. Plath, ___ S.C. ___, 284 S.E.2d 221, 230 (1981). Moreover, where the charge given adequately covers the substance of the request to charge, the trial judge may properly refuse the requested charge. State v. McDowell, 272 S.C. 203, 249

S.E.2d 916 (1978), cited in, Plath, supra. In the present case, the trial judge's charge clearly covered the substance of the requested charge, as held by the South Carolina Supreme Court (Petitioner's Appendix A-5), and complied with the mandate of the Court in Lockett v. Ohio, supra, and the law in South Carolina.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT.